

No. 2774

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LANCASHIRE SHIPPING COMPANY, LIMITED (a corporation), claimant of the British steamer "Skipton Castle", her engines, tackle, apparel and furniture, and all persons intervening for their interest therein,

Appellant,

VS.

THE AMERICAN IMPORT COMPANY (a corporation),
TILLMAN & BENDEL (a corporation), JAMES L. DE FREMERY and HENRI M. SUERMONDT, copartners doing business under the firm name of Jas. de Fremery & Co., THE APOLLINARIS COMPANY, LIMITED (a corporation),

Appellees.

BRIEF FOR APPELLEES.

WILLIAM DENMAN,
DENMAN AND ARNOLD,

Proctors for Appellees.

Filed this.....day of June, 1916.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

Filed

JUN 27 1916

F. D. Monckton
cl

No. 2774

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LANCASHIRE SHIPPING COMPANY, LIMITED (a corporation), claimant of the British steamer "Skipton Castle", her engines, tackle, apparel and furniture, and all persons intervening for their interest therein,

Appellant,

VS.

THE AMERICAN IMPORT COMPANY (a corporation),
TILLMAN & BENDEL (a corporation), JAMES L.
DE FREMERY and HENRI M. SUERMONDT, copartners doing business under the firm name of Jas. de Fremery & Co., THE APOLLINARIS COMPANY, LIMITED (a corporation),

Appellees.

BRIEF FOR APPELLEES.

The Issues and Burdens of Proof.

The pleadings in this case admit receipt of the Apollinaris, wickerware and agate ironware in good condition and their delivery in damaged condition. With

the issue thus framed, the burden was on the claimant of the ship to show that its negligence did not cause the injury. It attempted to meet this burden through the establishment of three affirmative defenses: (1) that the injuries arose from excepted causes in the bill of lading, i. e., "heat" producing an explosion of the bottles and therefrom "water" and "sweat"; (2) that the injuries arose from a vice inherent in certain cargo other than that sued for, i. e., the decomposition of an animal fertilizer stowed in a separate hold situate below the between decks compartment; and (3) that the injuries, if by any fault, arose through a fault not in the care of the cargo but in the management of the vessel, i. e., leaving this perishable cargo to stew in the heat and moisture created by this decaying fertilizer for some seven weeks after the heat was discovered.

In attempting to establish the first proposition, the first deposition taken showed that the heating of the compartment in which those fragile and destructible goods were stowed arose from causes existing in the ship when the cargo was loaded in her,—the failure to close the bottom of the compartment in which it was stowed and thus shut out any heat from the hold below, and the stowage of the decaying fertilizer under it. That the principles of decay were in the fertilizer before sailing is incontrovertibly shown in this first deposition by the fact that when first examined, only four days after sailing, it had already heated till it was

at least 17 degrees warmer than the next compartment and 50 degrees warmer than the outside air. The decay and heating were caused by moisture (64, 65) and it was shown that no water was made by No. 1 hold, in which the fertilizer was stowed (185).

The Supreme Court has squarely laid down that where the cause of injury excepted in the bill of lading concerns the matters controlled by section 2 of the Harter Act, i. e., loading and stowage of the vessel and her preparation for sea, the fact that the injury falls within the exception of the bill does not shift the burden of proof, but that at all times the burden remains on the vessel to show seaworthiness and diligence in stowage.

Martin v. The Southwark, 191 U.S. 1 at 6 and 7, 12 and 13, 16 and 17, reversing *The Southwark* (C. C. A.), 108 Fed. 880.

The opinion on pages 6 and 7 as well as 12 and 13 should be read to understand the full effect of the principle established, but the following are the portions specially applicable:

“It is argued that appellees are not claiming the benefit of the Harter act, but rely upon the contract in the bill of lading to exempt them from liability in the absence of affirmative proof of negligence. (page 16.)

“To permit the stipulations of this bill of lading to cut down the statutory requirements of §2 of the Harter act would be to allow the parties to enforce a contract in violation of the positive terms of the statute. As was said by Mr. Justice White,

of somewhat similar provisions in the contract before the court in *The Kensington*, 183 U. S. 263, 46 L. Ed. 190, 22 Sup. Ct. Rep. 102: 'It is apparent that they were void, since they unequivocally sought to relieve the carrier from the initial duty of furnishing a seaworthy vessel, for all neglect in loading or stowing, and, indeed, for any and every fault of commission or omission on the part of the carrier or its servants'." (page 17.)

"In the district court, which judgment was affirmed by the circuit court of appeals, it was held that the burden of proof, in view of the stipulation of the bill of lading in this case, was not upon the carrier, but upon the shipper, and that there could only be a recovery in the event that the shipper had shown, by satisfactory evidence, negligence upon the part of the carrier.

* * * * *

"It is urged that the findings in both the district court and the circuit court of appeals, that the loss did not arise from want of proper refrigerating apparatus, but was due to a breakdown in the machinery after the voyage was begun, are findings of fact in the courts below which should be held conclusive here. There are observations in the opinions of the learned judges consistent with the view that it was found that the loss was due to a breakdown in the machinery after the voyage had begun, and ordinarily such findings as to matters of fact are followed in this court, *but the case below was tried upon a theory which ignored the initial duty of the carrier to use due diligence to provide a seaworthy vessel, properly equipped for the purpose intended. The bill of lading was treated as a special contract, throwing upon the shipper, if he would recover, the burden of establishing negligence upon the part of the carrier.*

“As we have before stated, the right of the carrier to be exonerated in the respects named in the Harter act depends upon the exercise of due diligence upon his part in discharging the primary duty of providing a seaworthy vessel. The burden of proof being upon the carrier to show that he has exercised due diligence to provide a seaworthy vessel at the time he received the meat and started upon the voyage, the question arises, Was this duty discharged? ‘This due diligence required’, said the Chief Justice, in delivering the opinion in *International Nav. Co. v. Farr & B. Mfg. Co.*, 181 U. S. 218, 45 L. Ed. 830, 21 Sup. Ct. Rep. 591, ‘diligence to make the ship in all respects seaworthy, and that, in our judgment, means due diligence on the part of the owner’s servants in the use of the equipment before the commencement of the voyage and until it is actually commenced’. An examination of the record convinces us that the respondent did not show by the weight of the testimony that this initial duty had been discharged.”

Martin v. The Southwark, 191 U. S. 1 at 12, 13.

This decision clearly disposes of the cases cited on pages 5 to 8 of appellant’s brief, which may be distinguished on the ground that in proving the ships within the phraseology of the exceptions in those cases, it was not at the same time shown that the cause arose in making the vessel fit and seaworthy for the voyage.

The burden of proof, as determined by the pleadings, has therefore never shifted from the claimant of the ship, the appellant, as to any of the issues in the case and, since it comes into this court as a trial *de novo*, it was incumbent on the claimant to maintain this

burden of proof on each and all of them. The fact that the lower court has decided one of them adversely to it, certainly cannot improve claimant's position as to the others.

At the trial in the lower court, we urged, and we now urge here:

1. That the shipowner has not maintained its burden of proof that the ship was seaworthy as to the compartment in which these fragile articles were stowed, it being admitted that the flooring in the hatch, a part of the ship's structure as distinguished from mere dunnage for the cargo, and completing the between decks hold as a supposedly cool compartment, had not been laid, but that the hatch floor had been left partly open. That the animal fertilizer stowed in the hold next below had in it the active principles of decay and heat when the vessel sailed and hence the between decks compartment left open to such heat was unseaworthy for the carriage of charged mineral waters and other cargo with it likely to be injured by water and sweat.

2. That the fact that this unseaworthiness was latent does not excuse the shipowner, since it has failed to place in its bill of lading any exception of latent unseaworthiness.

3. That the shipowner has not maintained its burden of proof, that it was good stowage for a voyage twice through the tropics to place wickerware, susceptible to rot, and fine ironware, likely to rust, in the same compartment with bottles containing explosive mineral

waters which have considerable breakage on normal voyages, and when, as here, the bottles are stowed under the ventilators and heated by the upflow of warm air from the lower hold and then, on a change in the wind, suddenly chilled by the cold midwinter air blowing down the vents from the outside.

4. That the shipowner has not maintained its burden of proof that it exercised due diligence to make the vessel fit for the voyage, as required by the Harter Act, it appearing that the fertilizer was stowed in part, nine days and the mineral water eight days before the vessel sailed and that the fertilizer had greatly heated within four days after sailing, and no evidence being offered of any due diligence in inspecting the vessel before sailing which failed to disclose the heating. For all the evidence shows the crew or officers knew of some heating before sailing and did nothing to remedy it.

5. That the ship has not maintained its burden that the damage to the cargo was caused by any inherent vice in the appellees' cargo as distinguished from the cargo of other persons.

6. That, regardless of burden of proof, it affirmatively appears that the captain was negligent in caring for the cargo in failing (a) to close the between deck hatch at once on December 22; (b) to close it at Las Palmas; (c) in letting the cargo stew for seven weeks in this steaming compartment without doing anything for its relief.

7. That the owner's primary obligation under section 1 of the Harter Act, as to the care and custody of the cargo, continues during the entire voyage and that it is only when the care of the cargo is a mere incident of management of the ship, *qua ship*, that it ceases to be controlled by the first section of the Act.

We might have treated points 6 and 7 first, because Judge Dooling's decision is based on them, and this court's agreement with him on these would obviate the necessity of considering the other five. We have, however, arranged the brief in logical and chronological order, however. The failure to maintain the burden of proof as to the other issues raised would entitle libellant to recover, even if Judge Dooling had not rendered his very sensible decision that the captain did not properly care for the cargo.

It will be noted by the court that neither appellant's brief nor its argument fairly discusses the majority of the points raised in the case and hence, that we have no chance in this brief to meet our opponent's contentions on issues on which it has the burden of proof. This, we take it, was its duty, and we beg that if we are so advised we may answer in a supplementary brief any new matter it offers in its reply.

I.

The shipowner has not maintained its burden of proof that the ship was seaworthy as to the compartment in which these fragile articles were stowed, it being admitted that the flooring in the hatch, a part of the ship's structure as distinguished from mere dunnage for the cargo, and completing the between deck's hold as a supposedly cool compartment, had not been laid, but that the hatch floor had been left partly open. The animal fertilizer stowed in the hold next below had in it the active principles of decay and heat when the vessel sailed and hence the between decks compartment left open to such heat was unseaworthy for the carriage of charged mineral waters and other cargo with it likely to be injured by water and sweat.

At the argument of this appeal, counsel stated and reaffirmed that there was no evidence in the record, that it was customary to complete the forward between decks compartment by laying the planking of the hatch or otherwise closing it by boards or canvas. On the contrary it is clearly proved by our opponent's experts that the No. 1 hold and the forward between decks are separate compartments of the ship, intended for different kinds of cargo, each with a complete ventilator system, intentionally distinct from that of the other.

The ventilator pipes from No. 1 hold passed through the forward between decks compartment and out to the upper deck where they terminated in the four ventilator hoods. The ventilator pipe out of the top of the between decks fitted around the outside of the pipes from the hold and through it passed in and out a *separate* current of air.

One of these experts, Captain Keame, after showing the identity of his vessel's No. 1 hold and his forward between deck compartment with those of the "Skipton Castle", testified regarding the purpose and desirability of having the two compartments completely separated so that no air could pass from one to the other, as follows:

"Q. Why do you have this pipe—as I understand it this pipe leading from the lower hold up to the upper deck through the between deck is solid so that none of the air from that pipe could get in the between deck space?

A. Yes, sir.

Q. *Is that to prevent any foul matter getting between the between deck?* A. *Yes, sir.*

Q. As I understand it, the air coming from the lower hold goes right up through there and would not stop at the between deck? A. It would drift up.

Q. Suppose you had great heat down there you could not expect that heat to drift back through, it would naturally go out?

A. Our experience shows it does go out, we never look for that.

Q. That is the reason why it is made solid?

A. Yes, sir.

Q. That is to say, made solid from the lower hold to the outside deck? A. Yes, sir.

Q. Everything passes between the between deck hold to the outside space? A. It does not do that.

Q. You want it to do that? A. No, sir.

Q. *Your idea is to prevent the heating or moisture from getting into the between decks?* A. Yes, sir."

Deposition Captain Keame, Ap. 219.

Captain Holliday says:

"Q. So that none of that ventilation from the lower hold can get into the 'tween decks, that is the idea, is it not? A. Yes, it passes right up.

Q. And out of the ship? A. Yes.

Q. The idea being to make two separate holds between the lower hold and the 'tween decks and to carry the ventilation right through out from the lower hold.

A. Yes, it is telescoped.

Q. I mean the purpose of that is to give a separate ventilation?

A. For both the lower hold and the 'tween decks.

Q. So as to keep them apart; if you have warmer ventilation in the hold, it will go up and out?

A. Yes, it passes right up.

Q. I mean the purpose is to have it go up there instead of having it mix through the 'tween deck space?

A. That is right.

Q. Your idea is that that forward 'tween deck space is the best place to stow mineral waters? A. I do.

Q. *Because there you have the cooling effect of the outside air from the ventilators?* A. Yes.

Q. *And you can separate it off from the heat of the lower hold?* A. Yes."

Ap. 83, 84.

"Q. Now, is it not another reason why you desire to stow the mineral waters in the 'tween deck space, *that you want to avoid extremes of temperature?*

A. Well, the 'tween deck space is about *as equal in temperature as you can get.*

Q. You are getting off, then, *from the heat below*, and you simply have the *equalizing temperature* of the air on the outside? A. Yes."

Ap. 84, 85.

“Q. You do not expect to ventilate through these hatches, you ventilate through the ventilators?

A. That is what they are there for.

Q. You don't ventilate through those hatches?

A. No.”

Ap. 89, 90.

Of course to make this separate ventilation effective, the hatch between the between decks compartment must be closed. This was not done on this occasion. The mate frankly admitted that warm air arising from the hold below would ventilate through the few boards that had been put in (Ap. 192, 138, 139).

The captain of the “Skipton Castle” describes the advantages of the forward between decks compartment for the carriage of carbonated waters as follows:

“Q. In your judgment, Captain, was there any other portion of the vessel than No. 1 fore tween decks where a more *uniform temperature* can be maintained?

A. No, sir.

Q. Why not?

A. It is furthest away from the boilers, it is the smallest space with the biggest amount of ventilation, which means you can keep it at a *more normal heat* than any other part of the ship, except No. 5 between decks which carries vibration. I could not say which has the advantage of capacity.”

Ap. 171.

All the lower holds are affected by the vessel's boilers and furnaces, for we find that No. 2 hold, which was stowed when the temperature was around 40°, had risen to 83° when the air was around 53°. This warm air would of course rise through the hatch into the compartment above if not sealed off and destroy the

advantage of the equable temperature due to the large ventilation in that smaller hold.

The efficient cause, therefore of the explosion of the Apollinaris and filling of the between decks with moist air, and the consequent rotting of the wrappers and of the wickerware and rusting of the enamel, was not the stowage of the fertilizer in the lower hold—but the failure to complete the ship's structure at the bottom of the between decks compartment and hence force the hot air of the lower hold out through its proper vent. The stowage of the fertilizer need not have been disturbed in the slightest way to make the compartment above seaworthy. The failure to make the hatch tight, a matter of ship structure, was the *causa causans* of the loss.

The question then arises, is a ship's compartment seaworthy for the carriage of fragile and explosive mineral waters, where her structure is so arranged before and at the time of sailing that it must *necessarily* in the course of the voyage, be flooded with streams of very hot air from below, alternating (as the wind blew down the ventilators) with very cold air from above, and where, necessarily, the water will be caused to explode, and sweat and rust damage occasioned?

“The term ‘seaworthy’ is relative. A ship leaky in her deck may be seaworthy for carrying stone, iron, coal, and very many other things, even more valuable in respect to avoirdupois. But it cannot legitimately be contended that a ship is seaworthy, as to perishable articles, when it leaks in such a manner and degree as to cause damage to

a very large proportion of such articles by a process plain to all on board, and obvious throughout the voyage; the damage to flour in this case showing itself, in several instances, in the form of paste oozing through the cracks of the barrels. A ship may be seaworthy as to one sort of cargo, and unseaworthy as to another. When a customary and well-known article of commerce is received on board ship, and carried on a voyage, the master guaranties the seaworthiness of his ship for taking charge of that article. As to her cargo, seaworthiness is that quality of a ship which fits it for carrying safely the particular merchandise which it takes on board. The ship is impliedly warranted to be seaworthy quoad that article, and, if damage occurs in consequence of the unfitness of the ship for carrying that article, the ship is liable, and cannot exonerate itself by proving the *non sequitur* that it is capable of carrying safely, and without damage, some other article of a different character."

The Thames, 61 Fed. 1014 at 1022 (C. C. A.).

"The term 'seaworthy' in its earlier use, it must be admitted, was not of as broad or extended signification as under the present advanced state of commerce and transportation facilities, but it now has relation to the article carried, and *the different compartments of the ship* and their particular use as well as to the navigability of the ship. *The Southwark*, supra; *The Thames*, 61 Fed. 1014, 10 C. C. A. 232; *The British King* (D. C.) 89 Fed. 872."

The Indrapura, 178 Fed. 591 at 594.

A ship's refrigerating compartment is unseaworthy for the carriage of meat if at sailing the cooling machinery is defective.

The Southwark, 191 U. S. 1.

The presence of foot and mouth disease in a hold into which cattle are loaded makes it unseaworthy for the carriage of cattle.

Tattersall v. Nat. SS. Co., 12 Q. B. D. 1014.

A compartment is unseaworthy to carry butter without cooling apparatus.

Howson v. Atl. Transport Co., 1903, 1 K. B. 114.

The No. 1 hold of a vessel was held unseaworthy for the carriage of sugar because the cover over the man-hole leading into the ballast compartment beneath was not made tight before putting in the cargo, whereby moisture reached the sugar stowed above.

American Sugar R. Co. v. Rickinson, 120 Fed. 591.

We cannot see how these cases can be distinguished from the case at bar. All that was necessary to protect the cargo in the between decks was a proper completion of the floor of the compartment by the hatch boards which are a part of the ship's equipment. Hermetically sealing by tarpaulins, even, was not necessary as the fine ventilator system for the hold below would have taken care of the hot air, had not the large hatch opening drawn the air by another channel. In so far as the heat of the rotting fertilizer is concerned, it is not a matter of stowage at all. The goods in the between decks could have been stowed exactly as they were. The only change necessary to avoid the damage was not in the stowage but the completion of the ship's structure across the floor of this compartment.

In response to counsel's suggestion that the mineral waters would burst anyhow because stowed on the steel floor and around the steel ventilators, we remind him of what seems to have been forgotten, that the deck was dunnaged (130). If the ventilators, with their frequent changes of temperature and hence sweating, were not matted as the sides of the compartment were (130), it was admitted bad stowage. With the perfect ventilation from four large ventilators in this small compartment (150), any warmth which might have come *through* the deck plates would have been easily taken care of.

In response to counsel's suggestion that the compartment was seaworthy because heat would pass directly up from the lower hold out the opening of the *two* hatch boards taken off the upper hatch at each end, we point out that these were off only in the day time and in fair weather. It is apparent that even when these boards were off the draw of the ventilators, opening high above the decks, with their cowls especially constructed for an intake and outflow of air, would bring the hot air from the lower hatch over to them and hence to the explosive mineral waters stowed beneath them.

In response to the further suggestion that the unseaworthiness of the compartment was not the cause of the injury to the baskets and ironware because they were not stowed in the line of the flow of hot air from the hatch below to the hatchboard opening above, we say that it was not the direct application of heat which damaged these goods. It could and would not do so. It

was the alternations of heat and cold that broke the bottles whose water dampened the air, which caused moulding of the baskets and rusting of the ironware. Besides a large part of the baskets were stowed right over the open hatch (139, 193).

In our next section we will show that once it appears that the compartment is unseaworthy, it is immaterial whether or not the captain was conscious of it. The ship is in any event liable, in the absence of a waiver of the warranty of seaworthiness in the bill of lading.

II.

The fact that this unseaworthiness was latent does not excuse the ship, since it has failed to place in its bill of lading any exception of latent unseaworthiness.

It was for a time contended that the Harter Act *ipso facto* relieved the ship owner from liability for latent defect in her structure or equipment. This contention, however, was squarely disposed of by the Supreme Court in *The Carib Prince*, where it was held that, so far from relieving the ship from liability for latent defect, it was merely permissive to the owner to do so by a specific provision in his bill of lading, limiting his guarantee of the vessel's seaworthiness.

The Carib Prince, 170 U.S. 655.

There was no such permission in the bills of lading here. The United States Supreme Court stated

this liability for latent defect in *The Caledonia*, 157 U. S. 131, in the following language:

“In our opinion, the shipowner’s undertaking is not merely that he will do and had done his best to make the ship fit, but that the *ship is really fit to undergo the perils of the sea and other incidental risks to which she must be exposed in the course of the voyage*, and, this being so, that undertaking is not discharged because the want of fitness is the result of latent defects.”

The Caledonia, 157 U. S. 124 at 131.

In fact, a defect in a cargo compartment, such as a port improperly fastened but which could have been fastened after sailing, makes the vessel *unseaworthy only if the officers are unconscious of it*.

“They believed it to be securely closed and that it would remain so during the voyage. It was neither intended nor expected that it would require or receive any attention at sea.”

International Nav. Co. v. Farr, 181 U. S. 218.

Whereas if the port was known to be open, or expected to be examined for securing in rough weather, and through failure to close it water entered the hull in rough weather, the defect is not unseaworthiness but failure in management of the vessel.

The Silvia, 171 U. S. 462.

It is therefore submitted that the claimant and appellant has entirely failed to maintain its burden of proof that it had performed its undertaking to furnish a seaworthy vessel, and that the latent defect (if it was latent) in the between decks compartment, is in fact affirmatively shown to be the cause of the injury.

III.

The shipowner has not maintained its burden of proof, that it was good stowage, for a voyage twice through the tropics, to place wickerware, susceptible to rot, and fine ironware, likely to rust, in the same compartment with bottles containing explosive mineral waters which have considerable breakage on normal voyages, and when, as here, the bottles are stowed under the ventilators and heated by the upflow of warm air from the lower hold and then, on a change in the wind, suddenly chilled by the cold mid-winter air blowing down the vents from the outside.

As we have shown, the Supreme Court holds that where the facts raise a question as to making the vessel and her cargo fit for the voyage, i. e., involve section 2 of the Harter Act, the owner must maintain the burden of proof that he has used due diligence as to her stowage.

Martin v. The Southwark, 191 U. S. 1, see supra, first chapter of this brief.

It is a matter of common knowledge and experience that mineral waters will have a certain amount of explosion even under the ordinary temperatures of voyages twice through the Tropics (241), and that this likelihood increases under sudden changes of temperature. It is for this reason that they were put in the forward between decks, which was alleged to be the coolest place with the most equable temperature, al-

though we shall show by the mate's admissions that, for this season, it was probably the hottest.

Mr. Anderson, the Apollinaris agent, who had experience with over 250 shipments of carbonated waters, says:

“Q. You would not attempt to say that instructions have been given to this line of vessels?

A. I would not. I only speak of that generally to show the shipping instructions are to keep it fore and aft under the water line and away from the boilers so as not to be subject to heat.

Q. What you mean to say is that it is your desire that it be stowed in the coolest portion of the vessel?

A. In the coolest portion of the vessel and away from the boilers.

Q. And as I understand it where it would not be exposed to changes of temperature?

A. Not rapid changes.”

Ap. 112.

“Q. It would be true of all carbonated water?

A. All carbonated waters, anything carbonated should be stored in a cool place, whether champagne or water.

Q. And is the same thing true in regard to sudden changes of temperature?

A. Any highly carbonated or highly charged liquid.”

Ap. 113.

Captain Craven says:

“Q. In which of the holds, the lower hold or the between deck hold, is a more uniform temperature?

A. In her between deck hold.

Q. If you were to return to Antwerp and bring out another cargo of the same character as this one, would you alter the stowage of the mineral water?

A. No. 1 between decks fore parts.

Q. Would you change the stowage from what it was on this voyage? A. No, sir.

Q. In your judgment is there any other place in the ship in which they can be stowed as well as they could be in No. 1 fore between decks. A. No, sir.

Q. Why is that?

A. *It maintains an even temperature, as even as you can get it in a ship's hold."*

Ap. 175.

Captain Keame says:

"Q. Take mineral waters that are affected by heat, would you stow them in No. 1 hold?

A. No. 1 between deck.

Q. If you could? A. Yes, sir.

Q. What is the reason for that?

A. Well, it is farthest away from the boilers for one thing and experience has taught us it is the best place to put them.

Q. Mineral waters are liable to blow up if they get too hot? A. They are.

Q. Have you ever had that experience. A. No, sir.

Q. The chief thing is to get them in the coolest place? A. Yes, sir.

Q. Because they are liable to burst from the heat?

A. Yes, sir."

Ap. 217.

Captain Halliday says:

"Q. Now, is it not another reason why you desire to stow the mineral waters in the 'tween deck space, that you want to avoid the extremes of temperature?

A. *Well the 'tween decks space is about as equal in temperature as you can get.*

Q. You are getting off, then, from the heat below, and you simply have the equalizing temperature of the air on the outside? A. Yes."

Ap. 84, 85.

"Of course we know mineral waters will break themselves, without any assistance from us."

Captain Baird, Ap. 241.

“Q. Would it ever raise your hold to 90 degrees?

A. If your between decks is over the top of the boilers, yes.

Q. You would not put your mineral waters in there?

A. No.

Q. You think that would be too high a temperature to be a safe thing? A. Yes.”

Captain Woodside, Ap. 54.

The temperature record shows that in the first day out from Hull, No. 2 hold, which is separated from the engine room by No. 3 hold, had a temperature of 83° when the cargo had been stowed during a temperature of 40°, and that when in the cold waters of South America, and long after the fertilizer had cooled, the warmth of No. 1 hold was about the same as No. 2. So we could have expected that, in the absence of the fertilizer, the heat coming up from No. 1 hold through the open hatch would have been around 83°, or about 30 degrees warmer than the outside air (Ap. 153).

It is admitted that *in rough weather* No. 1 forward between decks is the poorest of all for ventilation, because its ventilators often have to be closed on account of spray coming over the bow, while the other holds had their ventilators still operating. Indeed this was one of the mate's ways for accounting for the greater heat in No. 1 hold over the others.

“A. I know there was quite a big difference. I did not know it was 20 degrees. I did not probably look at what the temperature was.

Q. What was the cause of that?

A. The only thing I can think about it is, *it was in bad weather when this change occurred, and the hatches were covered up, had to be battened down.* That is the

only time I can think of, allowing it to run up in temperature like that.

Q. Would not all the other hatches be battened down at the same time? A. Yes, sir.

Q. Why should this hold be 20 degrees hotter than the others? There is no explanation for it, is there?

A. No, sir, there is not.

Q. Excepting that there was something in the cargo that was heating? That is the only explanation you have for it? There was something inside heating the cargo?

A. *It might have been that she was taking a little water over the forecastle head, and would stand the after hatches being uncovered and not the forward hatches.*

Q. The forward hatch would very often have to be covered up on account of taking water?

A. Especially if the wind is ahead; more so than No. 2 or No. 3 or No. 4 or No. 5 hatch.

Q. That is likely to make a difference of 20 degrees in the temperature of the holds?

A. *That is likely to make a very marked change.*

Q. So that when the head wind is on your forehold is likely to be 20 degrees hotter than the other holds?

A. I would not say 20 degrees. *There is likely to be a marked change in the temperature between that hold and any other hold, as it is covered up. I did not think it would be 20 degrees.*

Q. That would occur whenever you had a head wind?

A. A change in the temperature, yes."

Ap. 148, 149.

We thus find that none of the benefits which all the experts claimed for the cool ventilation and even temperature of forward between decks were obtained but, on the contrary, the waters were exposed to very rapid oscillation of temperature between the hot air from the lower hold and the cold air blown down the ventilators from time to time, as the vessel met more or less strong breezes. For instance, in a following breeze at about the speed of the vessel, there would be

no circulation of air forced through the vents from the outside, but the warm air would be steadily rising through the open hatch and the mineral water heated up. When the wind changed, a sudden stream of cold air would be admitted. So also in cold, pleasant weather after bad weather when the ventilators are opened up, all the accumulated heat from the lower hold is met by the cold blast from the outside.

Such a stowage is certainly bad. The officers had common knowledge, which they admit, of all the elements of the bad stowage. They knew that the carbonated waters must not be exposed to rapid changes of temperature. They knew that very cold winter air, between 40° and 50° in temperature, would come in on the mineral water when the wind came down the vent. They knew that when the air was quiet over the decks, as in a following breeze, the hot air from the normal internal heating of the ship would come up through the wide spaces between the few planks in the hatch flooring and heat up the waters. They knew, therefore, that waters would be subject to sudden changes of temperature, even if they were in excusable ignorance of the dangers inherent in bone flour.

If the stowage had been proper, no hot air at all would have come up into the No. 1 between decks, and hence, even during the time when this compartment had to remain entirely closed (because in the fore part of the vessel), no harm would have arisen. It therefore follows that the ship must pay for the damage to the cargo as for improper stowage of the three perishable commodities where the alternation of hot and

cold air were so likely to explode the mineral waters even in the absence of the fertilizer.

IV.

The shipowner has not maintained its burden of proof that it exercised due diligence to make the vessel fit for the voyage, as required by the Harter Act, it appearing that the fertilizer was stowed in port nine days, and the mineral water eight days, before the vessel sailed and had greatly heated within four days after sailing, and no evidence being offered of any due diligence in inspecting the vessel before sailing or that the heating had not commenced before sailing, which failed to disclose the heating. For all the evidence shows the crew or officers knew of some heating before sailing and did nothing to remedy it.

We have heretofore shown "unseaworthiness" in the structure of the between decks compartment, and "bad stowage" in placing the baskets and ironware in the same small compartment with the explosive waters, where they were piled under the vents in midwinter, with the warm inner air and cold outer air alternatively heating and cooling them. On neither of these issues is the question of burden of proof of much importance, as the facts are undisputed.

In this chapter we will show from the log that there was no inspection of the cargo and holds during any

stages of stowage or after stowage, just before the sailing of the vessel, and further that there is no evidence of any kind of diligence in inspecting either No. 1 hold or the forward between decks during or after loading and cargo in it. The case of *Martin v. The Southwark*, 191 U.S. 1, supra, laying down the rule that even bringing the injury within the express provisions of a bill of lading did not shift the burden of proof where its cause arose prior to sailing, further described the obligation to inspect the vessel before sailing time as follows:

“But whether fault can be affirmatively established in this respect, it is not necessary to determine. The burden was upon the owner to show, by making proper and reasonable tests, that the vessel was seaworthy and in a fit condition to receive and transport the cargo undertaken to be carried, and if, by the failure to adopt such tests and to furnish such proofs, the question of the ship’s efficiency is left in doubt, that doubt must be resolved against the shipowner, and in favor of the shipper. In other words, the vessel owner has not sustained the burden cast upon him to establish the fact that he has used due diligence to furnish a seaworthy vessel and, between him and the shipper, must bear the loss.”

Martin v. The Southwark, 191 U. S. 1 at 15, 16.

Other cases holding that diligence to make seaworthy requires a careful inspection are:

“Not liable for defects not discoverable by the *utmost care and diligence*.” (*The Irriwaddy*, 171 U. S. 187.)

“This case was quoted and followed in the still later case of *The Southwark*, supra, in which it was

reiterated that the burden was upon the vessel owner to show by reasonable and proper tests that the vessel was seaworthy and in a fit condition to receive and transport the cargo undertaken to be carried, and *that if, by failure to adopt such tests and furnish the required proof, the question of the ship's seaworthiness was left in doubt, that doubt must be resolved in favor of the shipper*, because the vessel owner had not sustained the burden cast upon him by the law to establish that he had used due diligence to furnish a seaworthy vessel."

The Wildcroft, 201 U. S. 378 at 389;

The Tenedos, 137 Fed. 443;

The Phoenicia, 90 Fed. 116, 119;

The T. & F. Lupton, 182 Fed. 144.

It is apparent that the inspection to determine whether the hatches should close over a cargo, made up of felt and animal fertilizer, and rags, should be with the "utmost care and diligence". A reasonable master would certainly think it necessary either to use a thermometer in the holds or at least to go down into the hatch of the between decks and observe from his own sense of heat and cold whether there was a normal temperature. The mate did have a thermometer and did take the temperature of some rags, apparently before loading, but there is not a line of testimony that we have found or can recollect that, after loading or during loading, there was any inspection whatsoever of hold No. 1, or of the between decks compartment over it. On the contrary the log shows a complete absence of any inspection. The mate did use his thermometer, however, after the third day out from Antwerp, when he discovered No. 1 hold to be 50 degrees

warmer than the air going down the vent into it and 17 degrees warmer than the next hold.

The log also shows that No. 1 hold had contained this animal fertilizer, ground bone with fat and meat adhering, *for some ten days before sailing*. If it was heated to the extent found four days after sailing, with all the cool ventilation from the outside pouring through it as the steamer moved through the air and created a current down and out its pipes, can it be said that during the ten days while the vessel was lying at the dock, with no motion to force a ventilation, it had not heated to an extent observable on an inspection with the "utmost care and diligence"? Can it be said that it was not so heated at sailing time, that any merely casual inspection would have discovered it? Was it not warm enough so that mere standing in the between decks near the open hatch would have detected it?

Was this warmth not, in fact, actually discovered before sailing and its cause negligently not inquired into? On this, instead of maintaining its burden of proof, the evidence of the shipping company is absolutely silent. This silence and this failure to inquire into the diligence used in inspecting the vessel during and after loading and before sailing, and as to whether the cargo had then begun to heat, is the more significant when we consider that the shipping company had pleaded due diligence in its answer, and that, in the examining of the master and mates, it was clearly developed that we attached great significance to the discovery of the heating of the cargo so soon after sailing.

It is therefore submitted that the shipping company has not maintained its burden of proof (a) that the cargo had not begun to heat before sailing, or (b) that, if it had begun to heat, they did not know it and negligently failed to remedy the situation, or (c) that, even if it had begun to heat, they had given the vessel an inspection of the "utmost care and diligence" and had failed to discover it.

V.

The ship has not maintained its burden that the damage to the cargo was caused by any inherent vice in the appellees' cargo as distinguished from the cargo of other persons.

The absence of a showing of "due diligence" in inspection of holds and in making the compartment seaworthy as to structure, and in properly stowing the mineral water, etc., clearly precludes the shipping company from availing itself of any of the provisions of section 3 of the Harter Act.

However, it is clear that the act does not cover anything other than the inherent vice of "*the* things carried" for the particular shipper complaining. The use of the article "*the*" makes it apparent that the legislature did not intend that the owner could ask the shipper to stand responsible for the inherent vice of any cargo but his own.

For instance, suppose the shipowner knows that animal bones and adhering fat and meat will rot and

he accepts such a cargo, it is apparent that accepting it with this knowledge will not make him liable to the meat shipper for the effects on his cargo of this inherent vice. But it is obvious that the fact that this is an inherent vice of the shipment of cargo owner "A" does not make it the inherent vice of "the things carried" for cargo owner "B", which receives damages of which the heat from "A's" rotting meat is the *causa causans*.

In bills of lading it is elemental that the exceptions of rust, breakage, leakage, etc., are construed to mean the breakage, leakage, etc., of the cargo of the particular shipper, and that they do not cover damage suffered by him through such happenings to other cargo.

Carver, Section 9;

Thrift v. Youle, 2 C. P. D. 432.

Scrutton's Charter-parties agrees in this and points out that this risk is covered by a familiar clause excepting "injurious effect from other goods".

Scrutton, p. 197 and note U.

VI.

Regardless of burden of proof, it affirmatively appears that the captain was negligent in caring for the cargo in failing (a) to close the between deck hatch at once on December 22; (b) to close it at Las Palmas; (c) in letting the cargo stew for seven weeks in this steaming compartment without doing anything for its relief.

Whatever may have been the culpability of the officers up to the time of the discovery of the heat in the lower

hold, there can be no question of their negligence thereafter. They knew exactly what was happening—of the heat constantly coming up into the compartment and hence, of course, of the rapid alternation of heat and cold to which the fragile bottles would be exposed.

On December 22, the temperature was discovered to be 101° in the forward hold at the foot of the ventilator. The next hold was 83° and the next 82°. Ninety degrees is regarded as the danger point (Woodside, Ap. 54).

Our opponent's expert, Captain Baird, said:

“Q. You say if you reached a temperature of 90° in your hold you would be worried, you would be looking for fire?

A. Yes, sir.

Q. If you got up to 100, you would be still more worried?

A. Yes, sir.

Q. And if you got up to 110, you would be some worried indeed?

A. I would not want to find it.”

Ap. 240-241.

Now what was done when this dangerous condition was indicated—dangerous certainly to the mineral water with its recognized sensitiveness to alternations of temperature? *But two hatch boards were taken off the forward end of the deck hatch above, and two of the boards aft.* The amount of ventilation thus afforded is shown by the ship's exhibit “B”, a photograph of the upper hatch on which is drawn the amount of the opening on taking off the boards.

Ap. 132, 164, Claimant's Exhibit “B”.

The hatches were covered at night and when the weather was not fine (165, 151).

This abortive measure was utterly ineffective—for on the next day after the two planks were removed the temperature was 100° in the lower hold. It did not go below this point for ten days and on the day after their arrival, and while they were lying at Los Palmas, December 29, it reached 110°.

Log, December 30, 1910.

Nothing was done to meet the emergency. The mate says:

“Q. When you discovered that, that it was 25 degrees warmer there—110 and 84 being the difference between the two—what did you do?

A. Kept the ventilators and hatches uncovered *just as usual* and turned to wind as the wind moved.”

Ap. 156.

“Q. Did you shift the cargo in any way to let the air down in there when you discovered there was 25 degrees difference?

A. No, sir, I don't think we shifted any cargo.

Q. Just let it stay there with 25° difference in temperature?

A. We kept the hold ventilated.

Q. You had ventilated them for eight days and it still kept up. Did you take any other precaution?

A. Not that I am aware of. We did not discharge any cargo.

Q. Did you shift any cargo?

A. No, sir.

Q. You cannot account for that at all?

A. No, sir.

Q. It is a very extraordinary thing, is it not?

A. Yes, sir, it is.

Q. Did you ever have it happen before in your experience at sea?

A. No, sir, not that I can call to mind now. It might have been done in coal cargoes, but I have never seen it before in general cargo.

Q. It acted like a coal cargo when it heats?

A. Yes, sir, just the same."

Ap. 156-157.

No excuse shown for this neglect. The weather was fine on December 22, 23, 24, 27 and 28. On any of these days the whole upper hatch could have been taken off, the little cargo on the lower hatch lifted on deck, the lower hatch flooring laid in its place, or part of the canvas awning from the deck laid over the opening and held by such planks as were at hand, and all the heat of the lower hold would have been forced out through its own ventilators. With the dunnage for the floor raising the bottles off the iron deck and the very large amount of ventilation in the small space of the compartment, the temperature would then not have been excessive at any time.

Counsel in his argument and in his brief asserts boldly that the *only evidence* as to the possibility of raising the baskets and other goods stowed in the hatch, consisted of the captain's denial that there was any place to put this small amount of cargo during the time he was laying a canvas or some more boards to cover the hatch. He forgets the photographs put in evidence by himself, showing surplus deck space around the hatch and on the forecastle, to stow all this cargo, the testimony he himself offered of the awnings on the fore-castle and the forward deck (166) which would protect

it from any rain while on deck, and the undisputed record of the log of the fair weather and a rising barometer from the 22nd of December on. *Res ipsa loquitur*. The captain's denial cannot rob the court of its right to make rational inferences from these indisputable facts.

After the arrival at Las Palmas the last chance of disproving negligence in care and custody of the cargo vanished, for, although while lying there in the harbor the temperature climbed from the 104° of the day before to 110°, still nothing was done.

Log, December 28, 29, 30.

Can there be any question that, even if the ship had been seaworthy and diligence shown in inspection, the proximate cause of the damage was the failure either to open up at once, on the first day of the heating, the entire face of the upper hatch, to let out all the hot air possible, or to take out the cargo and tighten the lower hatch floor? Can there be any doubt that a large amount of the damage could have been prevented if the captain had taken out the baskets and ironware at Las Palmas, dried them (if the bottles had already broken) and then closed up the lower hatch and pursued his voyage with a dry between decks space? Can there be any question that some, if not all, of the bottles were broken after the arrival at Los Palmas, when the temperature rose to 110°.

It is elementary that the duty of the ship as custodian of the cargo is much higher than that of the ordinary bailee.

“The master, during the voyage, is undoubtedly bound to take all possible care of the cargo, and ‘he is responsible’ says Mr. Chancellor Kent, ‘for every injury which might have been prevented by human foresight, and prudence, and competent naval skill’. 3 Kent, Comm. p. 213.”

22 Fed Cases, Case No. 13,240.

“Such disasters are of frequent occurrence along the seacoast in certain seasons of the year, as well as on the lakes, and it cannot for a moment be admitted that the duties and liabilities of a carrier or master are varied or in any manner lessened, by the happening of such an event. Safe custody is as much the duty of a carrier as conveyance and delivery; and when he is unable to carry the goods forward to their place of destination, from causes which he did not produce, and over which he has no control, as by the stranding of the vessel, *he is still bound by the original obligation to take all possible care of the goods, and is responsible for every loss or injury which might have been prevented by human foresight, skill and prudence.*”

The Niagara v. Cordes, 21 Howard 7 at 26-27.

There is no evidence in this case that a sufficient number of the bottles had been heated to the explosion point at the time of the discovery of the rotting fertilizer, to have done any harm. If the captain had done his duty and taken off his hatch boards to admit air to the cargo, he could have told us exactly whether any damage had then arisen. There can be no doubt that practically the whole of the damage could have been avoided if the cargo had been cared for at once, dried out, etc., and the between decks separated from the hold. Instead he permitted the baskets and ironware and bottle wrappers to steam and rot and rust for over

seven weeks, fully aware of what must be going on, without making any attempt to remedy the situation.*

In view of these facts, it is submitted that Judge Dooling's decision is clearly supported by the record, even assuming that the burden of proof is on libelant when, as here, the cause of the heating is shown to be directly connected with making the vessel seaworthy and properly stowing the cargo. We have shown in our opening chapter, we think, counsel's error as to the condition of the law on this point, but it is submitted that it is a matter of indifference where the burden lies, when we consider the evidence in the light of common sense.

VII.

The owner's primary obligation under section 1 of the Harter Act, as to the care and custody of the cargo, continues during the entire voyage and it is only when the care of the cargo is a mere incident of management of the ship, qua ship, that it ceases to be controlled by the first section of the Act.

Appellant's counsel urges seriously in his brief that, once the vessel is sent to sea in a seaworthy condition, there can be no negligence in respect to the ship's duty to the cargo if the navigation or management of the vessel be in any way involved.

* The specification of error which claims that there should have been a division of damages having been abandoned in the summary in the brief (pp. 3 and 4) and in the argument, we do not touch on it here.

At the argument he expressed a serious doubt as to the correctness of this position—in fact, he practically receded from it. It is easy to understand this when we consider that the Supreme Court of the United States has twice held squarely contrary to the construction of his brief and that this court has twice laid down the contrary rule, which the District Courts of this Circuit have always followed.

In *Knott v. Botany Worsted Mills*, 179 U. S. 69, the Supreme Court held that it is not sufficient to comply with the provisions of section 1 of the Act, i. e., governing care, custody, loading or stowage of the cargo, merely before sailing, but that the obligation continues all through the voyage. In that case certain wool was properly stowed in a seaworthy compartment and was started on its voyage. While en route certain wet sugar was stowed near it and its drainage injured the wool. This drainage was caused by an alteration of the trim of the vessel. Nevertheless, the court held that the violation of one of the obligations toward the cargo, enumerated in section 1, i. e., the requirement for good stowage of cargo subsequently loaded, although occurring long after the voyage of the injured cargo had started, made the vessel liable; and this although a *causa sine qua non* of the injury, though not the *causa proxima*, was the alteration of the vessel's trim, ordinarily a matter of her management.

“Since this damage arose through negligence in the particular mode of stowing and changing the loading of cargo, as the primary cause, though that cause became operative through its effect on the trim of the ship, this negligence in loading

falls within the 1st section. The ship and her owner must therefore answer for this damage, and the 3rd section is inapplicable.”

Knott v. Botany Worsted Mills, 179 U. S. 69,
at 74.

In *The Germanic*, the vessel had been sent to sea in a seaworthy condition and otherwise complied with conditions precedent of section 3 of the Harter Act. Her voyage was completed and she was discharging her cargo when a cumulation of ice on her structure above her waterline combined with the change in her list due to the removal of part of her cargo, caused her to capsize and the libellant's goods were thereby submerged and injured. The question (as here) was whether the unloading the cargo, thus changing the list and trim of the vessel, was a matter involving the owner's duty to the cargo under section 1 of the act, or the captain's obligation in the management of the ship under section 3. The court held that it was a matter “*primarily*” concerning the owner's duty to the cargo under section 1 of the act, and that he was liable for neglect in its performance.

“If the primary purpose is to affect the ballast of the ship, the change is management of the vessel; but if, as in view of the findings we must take to have been the case here, the primary purpose is to get the cargo ashore, the fact that it also affects the trim of the vessel does not make it the less a fault of the class which the first section removes from the operation of the third. We think it plain that a case may occur which, in different aspects, falls within both sections, and if this be true, the question which section is to govern

must be determined by the primary nature and object of the acts which cause the loss."

The Germanic, 196 U. S. 589, at 597, 598.

The rule was similarly laid down by this court in *Corsar v. John D. Spreckels*, where it was held that since the failure to sail to the nearer port and the voyage to the more distant one was "primarily" a question of navigation of the vessel for her own safety and that of her crew and cargo, the greater injury to the water soaked cargo, during the longer voyage than in the shorter one, was damage merely "incidental" to the mistake of navigation and not primarily in the care of the cargo. In thus invoking the rule, Judge Ross relies on the *Germanic* decision and *Botany Worsted Mills v. Knott*, and cites the specific pages of the Reporter on which the rule appears.

"The question confronting him was *primarily and essentially one of navigation—how best, in view of the trying circumstances* in which he was placed, to deal with the elements and get his ship, with her crew and cargo, to the place of destination. That his action in determining that question was primarily and essentially one of navigation, does not, in our opinion, admit of the slightest doubt, and being such, neither the ship nor her owner is responsible for any incidental damage sustained by the cargo because of the provision of the third section of the act of Congress above referred to. *The Germanic*, 196 U. S. 597, 598; *Knott v. Botany Mills*, 76 Fed. 584.

Corsar v. J. D. Spreckels, 141 Fed. 260, at 263, 264.

Through some inadvertence counsel's brief, on page 27, quotes a sentence from the very page of Judge Ross'

opinion on which appears the above language. Standing alone this sentence would seem to bear a different construction from what it does when the next paragraph is read. The lines quoted above and Judge Ross' reliance on the two cases indicated seem to us necessary to show fully the rule of law he relied upon in the *Corsar* case.

The same rule, i. e., as to the primary nature of the act, was invoked by this court in *Nam v. The Appalachee*, 202 Fed. 826, where the question was whether the injury to cargo by pumping ballast water through ventilator pipes negligently left open in ventilating the cargo, was due to negligence primarily in the management of the ship, or primarily in the care of the cargo. Judge Ross states the rule as follows:

“Let that be done, and the remainder of the record presents the real question in the case, which is, we repeat, whether the damage done to the merchandise of the appellants is *properly referable to a lack of care in its proper protection and custody by the officers of the ship, or to their fault or error in the management of the vessel.*

* * * * *

“In the *Germanic*, the Supreme Court proceeded to declare the law to be:

“ ‘If the primary purpose is to affect the ballast of the ship, the change is management of the vessel, but if, as in view of the findings we must take to have been the case here, the primary purpose is to get the cargo ashore, the fact that it also affects the trim of the vessel does not make it the less a fault of the class which the first section removes from the operation of the third. We think it plain that a case may occur which, in different aspects, falls within both sections, and, if this be true, the question which section is to govern must

be determined by the primary nature and object of the acts which cause the loss'." (*Italics ours.*)

Nam v. Appalachee, 202 Fed. 822, at 826 and 828.

Judge Dietrich, in holding the *Jean Bart* liable for failure to open the ventilators and hatches whereby the cargo becomes sweated, also invokes the rule laid down by this court in *Corsar v. Spreckels*, *The Germanic* and *Knott v. Botany Worsted Mills*. All the damage there occurred en route, and the

"failure of the officers primarily related to the care of the cargo and only incidentally, if at all, to the navigation or the management of the ship".

The Jean Bart, 197 Fed. 1002.

In all these five cases, the court was concerned with the duty of the carrier directly to the cargo while en route. In all is recognized such a duty and that it is controlled by section one, and not by section three of the Harter Act. In three it was held that the duty was violated and the ship held liable.

In view of these decisions, it is not necessary to attempt to distinguish Judge Roger's decision in *U. S. v. N. Y. etc. SS. Co.*, (C. C. A.) 216 Fed. 61, 71.

Judge Rogers seems new to the consideration of admiralty cases. He certainly is ignorant of the historic ruling decisions on the Harter Act. Without reference to any of the cases above cited, he certainly seems to lay down the rule that once the vessel leaves port in a seaworthy condition, all neglect of the cargo is referable to management of the vessel and is excusable under the third section of the Harter Act. Not only

does Judge Rogers ignore these Supreme Court decisions and those of this court, but he, without mentioning it at all, squarely overrules his own court's decision in

The Persiana, (C. C. A.) 185 Fed. 396.

In that case Judge Lacombe said, at page 397:

“The ship had sufficient pumps in good condition to discharge the oil from the bilges and keep it at so low a level as not to expose the wool to damage. But the master intentionally allowed it to accumulate, because if it were pumped overboard it would be lost, but if he could keep it in the bilges till the ship got to New York, it could be pumped out here ‘for the benefit of the oil people’.

“The claimant contends that the ship is to be exonerated under the Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]). The question presented is whether the damage to the wool was ‘loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery’ of the cargo, within the first section of the Harter Act, or was ‘damage or loss resulting from faults or errors in navigation or in the management of the vessel’, within the third section of that act.

“The frequency with which pumps are worked during a voyage may fairly be classified as ‘management of the vessel’, but that is not determinative of the question here presented. In *The Germanic*, 196 U. S. 589, 25 Sup. Ct. 317, 49 L. Ed. 610, the court indicated that the purpose or intent with which some act was done or left undone was an important element to be considered. The court says:

“‘If the primary purpose is to affect the ballast of the ship, the change is management of the vessel, but if the primary purpose is to get the cargo ashore, the fact that it also affects the trim of the vessel

does not make it the less a fault of the class which the first section removes from the operation of the third. The primary object determines the class to which it belongs.'

"In the case at bar manifestly the oil was allowed to accumulate in the bilges, not for ship's purposes, but because, as Judge Hough aptly expresses it, the master 'chose to carry oil stowed in her bilges'. Such an act, although it happened during the voyage, is not within the provisions of the third section."

Now the failure to raise the cargo stowed on the hatch and place it on deck, and dry it, if wet, and close the hatch and then replace the cargo "although it happened during the voyage, is not within the provisions of the third section". It cannot in the slightest way affect the navigation of the vessel and its "primary purpose", and indeed only purpose, is to care for the cargo and prevent further harm to it. While the removal of the upper hatch boards to get the cargo out and the placing of a canvas or hatch boards under the cargo in the lower hatch may, in a remote sense, be called management of the vessel, it certainly is merely incidental to the primary purpose of caring for the cargo threatened with damage from the sweat and heat from the rotting fertilizer below.

It is therefore respectfully submitted that the appellant has not maintained its burden of proof on any of the issues raised by it and (1) that it has not excused itself from delivering in bad condition the cargo it had received in good condition, nor (2) established that it had furnished a seaworthy vessel, nor (3) that it properly stowed the cargo, nor (4) that it used due

diligence in inspection, nor (5) that it properly cared for, the cargo en route when it was discovered to be threatened with injury.

Dated, San Francisco,
June 24, 1916.

Respectfully submitted,

WILLIAM DENMAN,

DENMAN AND ARNOLD,

Proctors for Appellees.